

**Bradford College and Milk Wagon Drivers and Creamery Workers Union, Local 380, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 1-RC-17300**

April 30, 1982

## DECISION AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Joseph T. Griffin, a hearing officer of the National Labor Relations Board. After the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 1, this proceeding was transferred to the Board for decision. Thereafter, the Employer and the Petitioner filed briefs in support of their respective positions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. Bradford College, the Employer, is a Massachusetts corporation engaged in the operation of a college with gross annual revenues in excess of \$1 million. During the fiscal year immediately preceding the hearing, it purchased goods and materials valued in excess of \$5,000 directly from points located outside the Commonwealth of Massachusetts. The college concedes that it is subject to the jurisdiction of the Board, and we find that it is an employer engaged in commerce or in an industry affecting commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

2. Milk Wagon Drivers and Creamery Workers Union, Local 380, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Petitioner, has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner seeks a unit of full-time and part-time (three-quarters and one-half time) faculty, including the division chairmen, the B.A. coordinator, the English Language Institute director and faculty, the College Learning Program director and faculty, and the librarian and assistant librarian, but excluding one-quarter time faculty, administrators, managerial employees, guards, and supervisors as defined in the Act.

The Employer contends initially that the unit is inappropriate because its faculty are managerial employees, under *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), and thus not subject to the Act.

The Employer alternatively urges that, should the Board find contrary to its principal contention, then the appropriate unit should exclude the division chairmen, the B.A. coordinator, the English Language Institute director and faculty, the College Learning Program director and faculty, the librarian and assistant librarian, and one-half time faculty. Both parties agree that the one-quarter time faculty should be excluded.

The initial question to be resolved is whether the petitioned-for unit is inappropriate because the Employer's faculty are managerial employees within the U.S. Supreme Court's decision in *N.L.R.B. v. Yeshiva University, supra*. There, the Court defined managerial employees as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" through "taking or recommending discretionary actions that effectively control or implement employer policy."<sup>1</sup> The Court noted, however, that it was not suggesting an "application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them."<sup>2</sup> The Court cited with approval Board coverage of professional employees whose decisionmaking is limited to routine discharge of professional duties, such as architects and engineers who, while acting as team leaders, are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members.<sup>3</sup>

The Court further noted:

[O]ther factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students,

<sup>1</sup> 444 U.S. at 682-683.

<sup>2</sup> *Id.* at 690.

<sup>3</sup> *Id.* at 690, fn. 30, citing *General Dynamics Corporation, Convair Aerospace Division, San Diego Operations*, 213 NLRB 851, 857-858 (1974).

and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad.<sup>4</sup>

Turning to the instant case, it is clear in our opinion that the Employer in this proceeding fails to meet the criteria for collegial governance pursuant to which the Supreme Court found the Yeshiva faculty to be "managerial." We note initially that the Employer is a private, independent, nonprofit institution with a full-time faculty of 29 members. Authority for the overall control of the institution is vested in the board of trustees with particular responsibility for the sound financial operation of the college, for any new changes in the educational program of the college, and for the determination of major policies. In turn, the trustees have delegated to the president "full authority and responsibility for the administration of the college." This authority of the president *vis-a-vis* the faculty was amplified by the president's memorandum to the faculty on March 17, 1980, which stated, *inter alia*, that:

. . . meetings of the faculty alone have no power to set academic or administration policies. The President must run the college; it cannot be run by the faculty or groups within the faculty—even by implication.

These views were also reinforced by the vice president for college relations, who informed the faculty "that governance of [the] college was not a democratic government—it was a government from higher levels."

These views find support in a study of the college which was conducted by the New England Teachers Association (NETA) which has the authority to grant accreditation to colleges and universities of higher education in its area of jurisdiction. In NETA's spring 1981 report regarding the Employer, it cited a "lack of [faculty] participation in academic decision-making," a "disregard for stated operating procedures," and administration decisions made "in disregard of due faculty consid-

eration," and concluded there should be "greater representation of faculty in decision-making."<sup>5</sup>

The present record reflects that, while the written governing document, namely, the "Faculty Manual," would indicate faculty input in many areas of decisionmaking, the practices of the Employer's administration often are to the contrary:

All major changes in college curriculum have to be approved by the board of trustees.

Faculty salaries are determined by the president of the college.

Teaching loads, or requirements, are decided by the president and the academic dean.

The faculty choice for academic dean was ignored by the president, who chose one not recommended by the faculty search committee and without consultation with its members.

Division chair recommendations for new faculty members were rejected by the academic dean, and others were hired.

Faculty grades for students were altered by the administration without notice to the faculty members involved.

The academic dean made faculty evaluations before receiving the division chair's report.

Faculty members were demoted by the academic dean from full-time to part-time status without consultation of the chair or prior notice.

Faculty members were demoted from full-time to part-time status despite contrary recommendations from the division chairs.

The board of trustees does not grant faculty tenure, only "continuing appointments" of specified duration.

The president reversed a faculty member's decision to "drop" a student for excessive absenteeism after several warnings to the student by the member.

The president and academic dean canceled the 1980 summer school despite faculty protests.

Budget items have been transferred from the academic budget to the academic dean's budget.

The Faculty Manual, ostensibly the college's governing document, was not submitted to, or approved by, the faculty.

In sum, while the faculty and division chairs have the written right to make recommendations, the record shows that such recommendations were

<sup>4</sup> *Id.* at 690-691, fn. 31.

<sup>5</sup> These findings mirror a similar report 3 years earlier in which NETA noted a lack of structured tripartite government and a lack of an "internal governance structure."

often ignored or reversed by the president, by the academic dean, or by both with respect to curriculum, admission policies, graduation of students, course loads, course scheduling, grading of students, faculty hiring or retention, tuition, and faculty salaries. Applying the Supreme Court's criteria for managerial employees in institutions of higher learning, we conclude that the faculty in the instant case are not managerial employees. Accordingly, as the record evidence establishes, and the parties admit, that the employees involved here are professional employees within the meaning of the Act, we find that a unit of these professional employees is appropriate for the purposes of collective bargaining under the Act.

Turning to unit placement, the Petitioner would include the division chairs and the B.A. coordinator, while the Employer would exclude them as managerial or supervisory employees. The division chairs have the written authority to prepare departmental budgets, to evaluate appropriate faculty members, to assign students to faculty members for advice purposes, to hire faculty, and to assign courses. The record shows, however, that actual practice often diverges from the written policy. Faculty members have been hired by the academic dean without consultation; recommendations on faculty retention have been overruled by the academic dean; appointment commitments for the following academic year have been made by the academic dean prior to receiving the division chair's evaluation of that faculty member; budgetary items have been transferred to the academic dean's budget; and division chairs elected by the faculty have been fired as division chairs by the academic dean.

There are six B.A. coordinators, five of whom are also division chairs, since the duties are similar. The pattern of practice is the same. Moreover, both division chairs and B.A. coordinators teach, are regarded as faculty, and spend an insignificant amount of time on these collateral functions. Accordingly, we find the division chairs and the coordinator to be neither managerial nor supervisory employees, and shall include the division chairs and the B.A. coordinator in the unit.

With respect to the librarian and assistant librarian, the Petitioner would include them in the unit, while the Employer would exclude them as supervisors or as managerial employees.

The record shows that both the librarian and assistant librarian qualify as professional employees with advanced degrees in library science. Both attend faculty meetings, vote at such meetings, and are considered to be "faculty." There is no evidence that such employees spend more than 50 per-

cent of their time supervising nonunit employees.<sup>6</sup> Consequently, we shall not exclude them as supervisors.

Nor does the record support a finding that they are managerial employees. The librarian could be equated with a division chair and the assistant librarian with a faculty member. Although both have been involved in the budgetary process, the librarian's budget proposals have been reduced by the academic dean, the locks and keys to the library doors were changed without prior consultation, and the academic dean and dean of students determine the library hours.

Accordingly, inasmuch as neither the librarian nor assistant librarian is a supervisory or managerial employee, we shall include both employees in the unit.

The parties also disagree as to the unit placement of the "part-time" (one-half time) faculty,<sup>7</sup> some 15 in number. The Petitioner would include one-half time faculty in the unit, and the Employer would exclude them as not possessing a community of interest with the other professionals in the unit. The Board in *New York University, supra*, held that the differences in compensation, participation in university government, eligibility for tenure, and working conditions are so substantial in most colleges and universities that a community of interest is lacking between the two groups. Facts here show that the one-half time faculty are classified as independent contractors, generally cannot vote by ballot on *major* curriculum changes, are paid a flat fee twice a semester, and are not eligible for employer programs relating to life insurance, social security deductions, or retirement.

Accordingly, we shall exclude the one-half time faculty from the unit.<sup>8</sup>

The Petitioner would include, and the Employer would exclude, the director and faculty of the English Language Institute.

The English Language Institute (ELI) was set up in June 1979, and is intended to teach English as a second language to prepare foreign students for courses in American universities and for jobs upon their return to their home countries. The ELI offers 24 hours of English instruction a week to between 30 and 40 students per term.

The students receive no college credit for this work and do not matriculate at Bradford, although some advanced students may take college courses for credit at no extra cost.

<sup>6</sup> *New York University*, 205 NLRB 4, 8 (1973).

<sup>7</sup> Both parties agree that three-quarters time faculty should be included in any unit found appropriate by the Board.

<sup>8</sup> *University of Vermont and State Agricultural College*, 223 NLRB 423, 425 (1976).

The faculty consists of the director and three instructors. With the exception of the director, such instructors are paid less than regular faculty members; and, while they possess "faculty status," they vote only on certain issues at faculty meetings. Additionally, the ELI faculty teaches during different hours, are not subject to the Faculty Manual, have no "advising" responsibility, and do not share the same employment benefits.

Accordingly, we shall exclude the director and faculty of the English Language Institute, inasmuch as they lack a community of interest<sup>9</sup> with the full-time faculty of the college.

The College Learning Program was established in February 1980 for the purpose of assisting bright students from high school in accommodating their diagnosed learning disabilities and developing their study skills, writing skills, and time management. The 20 students in the program receive no grade or college credit, although they do receive a confidential report evaluating their progress. The staff consists of the director and a generic specialist. Neither supervises the other, each working with the special needs of small groups of students. Neither has served on a faculty search committee, although

they may attend faculty meetings. The record also shows that the hours of work and range of salaries are different from those of regular full-time faculty members.

Accordingly, we find that the director and the generic specialist in the College Learning Program do not share a community of interest with other faculty members and we shall exclude them from the unit.

In sum, we find the following unit appropriate:

Full-time and three-fourths time faculty, the division chairs, the B.A. coordinator, the librarian and assistant librarian, excluding the half-time and one-quarter time faculty, the director and faculty of the English Language Institute, the director and the generic specialist of the College Learning Program, all other employees, guards and supervisors as defined in the Act.<sup>10</sup>

[Direction of Election and *Excelsior* footnote omitted from publication.]

<sup>9</sup> *Point Park College*, 209 NLRB 1064 (1974).

<sup>10</sup> The parties stipulated, and we find, that the following employees also should be excluded from the unit: The president of the college, the vice president for college relations, deans, associate deans, the registrar, the public relations director, the director of the Counseling and Resource Center, the director of admissions, directors of various dormitories, and the director of development.